

2013 Conference on Securities Regulation and Business Law

February 7-8, 2013
Austin, TX

Accessing the Canadian Capital Markets

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Accessing the Canadian Capital Markets

Legal Considerations for Non-Canadian
Oil & Gas Companies

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ACCESSING THE CANADIAN CAPITAL MARKETS
LEGAL CONSIDERATIONS FOR NON-CANADIAN
OIL & GAS COMPANIES

Canada continues to be the world's leading capital market for natural resource companies. The Toronto Stock Exchange (the "**TSX**"), Canada's senior capital market, and the junior TSX Venture Exchange (the "**TSX-V**") are home to over one-third of the world's public oil and gas companies.

Notwithstanding a challenging 2012 on a macroeconomic level, oil and gas companies listed on the TSX and TSX-V raised approximately C\$9 billion in equity financings.

At the end of 2012, the TSX and TSX-V had a combined total of 394 oil and gas issuers, the most in the world, with an aggregate market capitalization of over C\$359 billion.

As a result, the TSX and TSX-V present not only a destination for foreign companies to raise capital, but also a significant source of acquisition targets and merger partners for international major and mid-cap resource companies.

In 2012, TSX and TSX-V listed oil and gas issuers completed 326 financings. In terms of new listings, the TSX and TSX-V facilitated 22 new oil and gas listings in 2012.

A critical factor in the growth of the Canadian market has been the depth of liquidity, with 2012 seeing over C\$250 billion of oil and gas shares traded. The market is supported by a broad institutional and retail investor base (including many American investors) and a large, sophisticated analyst community covering companies of all sizes. Also, supporting these companies is a similarly sophisticated and experienced professional community of investment bankers, accountants and securities lawyers who specialize in advising oil and gas companies. The Canadian securities regulators who administer National Instrument 51-101, the oil and gas disclosure rule discussed below, also have experienced geologists who understand the issues faced by resource companies and their projects.

Canadian investors have proven receptive to diverse commodities and geographical risks with TSX and TSX-V companies holding assets across the globe. Approximately half of the TSX and TSX-V listed companies have assets located outside of Canada.

Key Legal Considerations in Accessing the Canadian Capital Market

This memorandum summarises some of the key legal considerations for a non-Canadian company contemplating the possibility of raising capital in Canada by way of a public or private offering.

1. **Regulatory Overview**

Canada has a federal system of government, with power divided between the federal government and the provinces. Securities legislation is principally governed at the provincial level and each of the provinces and territories has its own securities legislation, although the rules in many areas have been standardised and cooperative systems established between the regulators (e.g., filing of a prospectus is done through a single lead jurisdiction, which coordinates the comments of the other regulators and provides a single point of contact). The securities laws determine whether or not a prospectus is required for a particular offering of securities and set out the forms and procedures which apply to different forms of offerings. These laws also establish the disclosure standards for oil and gas companies.

As discussed above, there are two principal stock exchanges in Canada: the TSX, for senior companies; and the TSX-V, for companies that are at a junior stage of development. These exchanges (collectively, the "**Canadian Exchanges**") have an ongoing role in regulating the conduct of listed companies, but (unlike in some other countries) do not generally play the principal role in vetting prospectuses. This role is undertaken by the provincial securities regulators.

In addition to securities laws and stock exchange requirements, a foreign company which is contemplating a re-domicile to Canada (as opposed to a secondary listing or placement of its shares) will also need to take into account Canadian corporate laws. Companies can be incorporated in Canada either at the federal level (under the Canada Business Corporations Act, the "**CBCA**") or under one of the provincial statutes. Again, there is substantial consistency between the requirements of the different statutes, although there are certain differences which may influence the choice of statute under which to incorporate.

It is possible for a foreign company to issue its shares to the public in Canada and become a "reporting issuer" under Canadian securities laws without becoming a "Canadian corporation". There are a significant number of non-Canadian companies listed on the Canadian Exchanges and the Canadian securities commissions have certain special rules and exemptions which apply to companies whose primary market is on a foreign exchange. However, there may still be reasons why a company would wish to shift its corporate domicile to Canada. This may be to effect a business combination with a complementary company or because the company makes the decision that it wishes to be listed only in a single jurisdiction and decides that Canada offers better opportunities to enhance the value of its shares. The structuring of redomicile transactions is further discussed in Section 3 below.

2. Public Offerings

A marketed public offering will in most cases be necessary in order to establish a public market in Canada for securities of a foreign company or a new Canadian holding company. Over the past few years the practice has evolved from using a "long form" prospectus to create the Canadian market to more issuers initially carrying out a secondary listing on the TSX or TSX-V and subsequently filing a "short form" prospectus when the market window opens.

2.1 "Long Form" Prospectus Offering

In order to carry out a long form prospectus public offering in Canada it is necessary to engage one or more registered dealers to act as agents or underwriters in connection with the offering. The process typically begins with preparatory tasks in which management is assisted by counsel, auditors, technical consultants and underwriters. Due diligence of the issuer is customarily conducted in conjunction with the preparation of a "preliminary prospectus", which is filed with the Canadian securities authorities. The regulators review the document and, after their comments are resolved by the company and its advisers, a "final prospectus" is filed, which enables the securities to be sold to the public in Canada. It would typically take four to six weeks to clear a prospectus with the regulators and closing usually occurs one week following the date on which the final prospectus is filed. Depending on the nature of the offering, the securities may be sold on an agency or underwritten basis.

In Canada, a prospectus must contain "full, true and plain disclosure of all material facts relating to the securities being issued" and must follow the detailed disclosure rules set out in the securities legislation. Canadian securities laws also prescribe a specific form in which a prospectus should generally follow.

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First appeared as part of the conference materials for the
35th Annual Securities Regulation and Business Law session
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